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IN THE SUPREME COURT
OF THE UNITED STATES

1982-1983 TERM

FREDERICK A. WEIN, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF OTHERS SIMILARLY SITUATED,

PLAINTIFF-APPELLANT

V.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA AND THE STATE BAR OF CALIFORNIA,

DEFENDANT-APPELLEE

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR CERTIORARI

Statements required under Rule 21 are as follows:

Questions Presented

Question No. 1

Whether in federal question jurisdiction each federal court exercises the judicial power of the United States which is co-extensive with the boundaries of the United States, due process requiring only that a defendant in a federal suit have minimum contacts with the United States, the sovereign that has created the court, and that such nationwide personal jurisdiction can be perfected by service using any method authorized by Rule 4, Federal Rules of Civil Proceedure?

Question No. 2

Whether plaintiff, consistant with due process, can constitutionally acquire long-arm personal jurisdiction over defendant which has the following minimum contacts with the forum State of Illinois:

1. Through the years, defendant has requested and received from thousands of

applicants certification from the Illinois Supreme court and law schools in Illinois and derived benefit from the educational institutions located in Illinois;

2. Through the years defendant has received millions of dollars in fees from Illinois applicants for taking the bar exam and received at least $47,700 for the exam in issue;

3. Over the years, defendant has corresponded with Illinois applicants by mail, such correspondance including the sending of applications, admissions materials, acknowledgements of filings, and other documents and correspondance;

4. Through the years, the multistate portion of the bar examination which counts for 40% of the California bar exam is given in Illinois and such grades are accepted and transferrable to defendant;

5. 159 applicants from Illinois took the bar exam in issue and over the many years,

many thousands of applicants from Illinois have taken the exam, which typically has a passing rate of 50%. For those failing the exam, defendent sends on its own initiate, a solicitation to reapply to take the subsequent exam and solicits a monetary fee of at least $230.00, which for the exam in issue, comes to approximately $18,400.00, with similar amounts for each exam given twice a year over the many years;

6. There are 413 members of defendant who are citizens of Illinois and defendant monthly mails such members literature, a bar journal, and other promotional advertisements wuch as for cruises and group insurance including a yearly solicitation through the years for said members to attend a state bar meeting in California held each year;

7. Defendant characterizes itself as a state agency and claims Eleventh amendment and judicial immunities thereby. The State of California, through the years, maintains

offices of the California State Franchise Tax Board and the California State Board of Equilization, both boards concerned with tax matters involving the State of California;

8. Defendant regularly sends bar examiners to attend seminars given in Chicago Illinois;

9. Defendant on a regular and continuous basis contracts with and pays a monetary fee to the National Conference of Bar Examiners to investigate and report on the character and fitness of all out-of-state applicants applying to defendant to take their bar exam, and

10. Defendant has attempted to submit a bill of costs with the clerk of the Court of Appeals for the Seventh Circuit and in so attempting to file, defendant has attempted to derive a direct benefit of the courts and laws of Illinois and attempted to use the court as a sword, not as a shield. In Illinois state courts, such activity would by itself be sufficient to defeat any special appearance made?

Question No. 3.

Whether the district court and the court of appeals erred in refusing to permit plaintiff to conduct any discovery in order to prove jurisdictional matters of which plaintiff has the burden of proof?

Question No. 4

Whether plaintiff's second amended complaint is sufficient under Rules 8,9,10, 12 and 23, Federal Rules of Civil Procedure?

Question No. 5

Whether plaintiff has sufficient nexus with the forum state to withstand a motion to transfer for forum non-convience under 28 USC 1404(a) and maintain the present situs of venue?

Question No. 6

Whether plaintiff has subject matter jurisdiction to maintain the action in the Federal Courts and whether the district court and the court of appeals erred in refusing to reach this issue?

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Rule 17(d): There are no official or unofficial reports of the opinions issued in this case. The district court opinion is presented in the appendix at pages A21 and A34. The decision of the Court of Appeals for the Seventh Circuit was issued as an unpublished order and is presented at page A1.

Rule 17(e): The judgment of the Court of Appeals for the Seventh Circuit which is appealed from was issued June 29, 1982 and entered on that date. Rehearing was denied August 4, 1982 and entered August 5, 1982. This court has jurisdiction to review the judgment by writ of certiorari under 28 USC 2101.

Rule 17(f): The constitutional provisions which the case involves are the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Additionally, Rules 8,9,10,12 and 23 Federal Rules of Civil Proceedure are involved.

Rule 17(g) CONCISE STATEMENT OF THE CASE

The present civil action was brought in the United States District Court for the Northern District of Illinois under the U.S. Constitution, the U.S. Anti-trust statutes, U.S. Civil Rights statutes, and various common-law causes, and invoked jurisdiction under the above and 15 USC 4, 28 USC 1331, 28 USC 1332, 28 USC 1337, 28 USC 1343, and Chapter 110, § 16,17 and 18 Illinois Revised Statutes.

Defendant, a public corporation of the State of California with headquarters and offices in California, moved under Rule 12 FRCP to dismiss the case grounded, inter alia, that the district court lacked personal jurisdiction over defendants,and subject matter jurisdiction relating to the issues and relief sought, the Eleventh Amendment to the U.S. Constitution, and judicial immunity. During the course of proceedings, numerous other issues arose, including inter alia, the dismissal of the amended complaint

under all twenty four grounds urged by defendant under rules 8,9,10,12 and 23 Federal Rules of Civil Procedure, the refusal of the district court to permit discovery relative to personal jurisdictional matters of which plaintiff has the burden of proof, and the sufficiency of form of the second amended complaint. The district court dismissed the action for lack of personal jurisdiction and declined to decide subject matter jurisdiction.

The Court of Appeals for the Seventh Circuit affirmed dismissal for lack of personal jurisdiction, affirmed the refusal to permit discovery relative to personal jurisdiction matters, and declined to decide subject matter jurisdiction and dismissal of the complaint for sufficiency under Rule 12, FRCP but implied approval of the dismissal under Rule 23 FRCP.

CONSIDERATIONS GOVERNING REVIEW UNDER RULE 17

The present decision is in conflict with the decision of Federal Trade Commission v. Jim Walter Corp., 651 F2d 251,(5CA 1981) that federal courts have nationwide jurisdiction in federal question cases, that the district court's jurisdiction is always potentially co-extensive with the boundaries of the United States in federal suits and that due process only requires that a defendant in a federal suit have minimum contacts with the United States, the sovereign that created the court. See also Fitzsimmons v. Barton, 589 F2d 330 (7CA 1979) and Driver v. Helms, 577 F2d 147 (1CA 1978). The present case was brought under the U.S. Constitution, U.S. Anti-trust statutes and U.S. Civil rights statutes.

This issue was briefed by both parties on appeal but was ignored by the Court of Appeals. The portion of plaintiff's brief on the subject appears in Appendix pages

A 80-85.

2. The judicial opinions in the present case significantly depart from the accepted course of judicial proceedings regarding long-arm personal jurisdiction, subject matter jurisdiction, sufficiency of the complaint, and discovery and present a singular approach only applied to plaintiff. Such departure by the two lower courts calls for the exercise of this Court's power of supervision. Plaintiff has shown in the lower courts that defendantis traditional minimum contacts with the forum state are substantial and continous. However, there seems to be an overriding public policy question which makes it onerous for the courts in Illinois to accept personal jurisdiction over defendant and for this reason, defendant's minimum contacts which were established are largely ignored or trivialized despite such contacts having been able to be shown without being permitted discovery regarding personal

jurisdiction matters which plaintiff has the burden of proof.

QUESTION No. 1 NATIONWIDE PERSONAL JURISDICTION

The issue of nationwide personal jurisdiction was briefed by the parties and argued at oral hearing. However despite such activity by the parties and the interest in the subject by the Court of Appeals for the Fifth Circuit in Burstein v. State Bar of California, 659 F2d 670 (5CA 1982) (since withdrawn for rehearing on nationwide personal jurisdiction), this basis for plaintiff to acquire personal jurisdiction over defendant was completely ignored by the court.

As stated in plaintiff;s reply brief, a pertinent portion of which is presented in the appendix at pages A80-85 and incorporated by reference herein, nationwide personal jurisdiction for a federal question is well stated in FTC v. Jim Walter Corp., 651 F2d 251 (5CA 1981) in that each federal court exercises the judicial power of the United States which is co-extensive with the boundaries of the United States and that

due process requires only that a defendant in a federal suit have minimum contacts with the United States, the sovereign that has created the court. In accord is Driver v. Helms, 577 F2d 147 (1CA 1978), Fitzsimmons v. Barton, 589 F2d 330 (7CA 1979). The present case was brought under the U.S. Constitution, U.S. Anti-trust Statutes and U.S. Civil Rights Statutes.

In such nationwide personal jurisdiction service can be had by any method authorized by Rule 4, Federal Rules of Civil Procedure, and in the present case, Rule 4(e) which utilizes the method of service authorized by the Illinois Long-Arm Statute, inasmuch as process of service and jurisdiction are seperate and distinct. See Terry v. Raymond Intern Inc., 658 F2d 398 (5CA 1981); Driver v. Helms, 577 F2d 147 (1CA 1978).

QUESTION No.2 TRADITIONAL MINIMUM CONTACTS

Let us now examine the contacts of defendant and the extent of said contacts with the forum State of Illinois.

1. 159 Applicants from Illinois took

the exam in issue of July 1980. This is only one examination. Undoubtedly many thousands have taken the bar exam over the years. For these thousands of applicants, certification by a Justice of the Illinois Supreme Court is required as is certification of applicant's law school in Illinois. Using 154 as a typical number and ignoring any probable increase, this means that over a period of 10 years there will be 1,540 applications from Illinois alone at an average charge of $300.00 each (also ignoring any probable increase) with these applicants having the same contacts. Defendant also utilizes to their own benefit the education derived from educational facilities in Illinois. Surely, Illinois has an interest in protecting its citizens with regard to such systematic and continuous contacts.

2. Defendant receives monetary fees ranging from $210.00 to $395.00 depending upon circumstances. Assuming an average

fee of $300.00 (plaintiff understands that the fees have increased) income to defendant is $47,700.00 from Illinois for this exam alone. Over the years, it is reasonable to assume that defendant's income from the State of Illinois would be many hundreds of thousands if not millions of dollars. Thus, defendant derives substantial income from the forum State of Illinois, and derives substantial benefits from the banking facilities and the economy of the state.

3. Receipt of all applicant's applications are acknowledged by mail and admissions materials are mailed to Illinois as well as other correspondance.

4. Fourth percent of the California Bar Examination is given in Illinois and defendant accepts the results of the multistate portion of the bar exam. This would apply to almost all of the 159 applicants and of almost all of the many thousands of past and future applicants from Illinois.

5. A typical passing rate in a July exam is 50% and a typical passing rate for a February exam is 30%. Assuming arguendo a passing rate of 50%, one half of all those Illinois applicants fail the exam. Along with the notice of failure defendant provides a direct solicitation for the subsequently given exam. This solicitation comprises application forms and a solicitation for a monetary fee of $230.00 to retake the exam. This solicitation is made by defendants without any request by applicants, is a purposeful activity under taken by defendant, and is certainly not a "unilateral activity" as will be further discussed hereinafter. Thus, from approximately 80 applicants from Illinois failing the exam, defendant solicited approximately $18,400.00 for this exam alone, not to mention the hundreds of thousands of dollars solicited from the many thousands of past and future applicants from Illinois.

The mailing of application forms and request for monetary fees from failing

applicants without any request from said failing applicants is not just a notification of failure, It goes far beyond that. It is an express overt solicitation, a purposefull activity, not just a providing of information as the lower courts have characterized it in an attempt to trivialize the activity.

6. There are 413 members of the State Bar of California who are citizens of Illinois. Defendant mails such members literature, a monthly bar journal, and other promotional advertisements such as for cruises or group insurance which surely are solicitations within the State of Illinois and purposeful activity within the State by defendant. In his reply brief, plaintiff submitted an example of solicitations made by the California bar journal soliciting members to attend the state bar meeting in California which is held every year. These 413 members yearly receive such purposeful solicitations from defendant and have received such for

the past many years. See Wilkerson v. Fortuna Corp. 554 F2d 745 (5CA 1977). The court of appeals has completely ignored this minimum contact.

7. Plaintiff has shown that the State of California maintains offices in Illinois for tax purposes and thus has continuous substantial contacts with the State of Illinois. The court's order states that it is plaintiff which characterizes defendants as a "state agency". This is not correct. It is defendant which characterizes itself as a state agency in order to claim Eleventh Amendment immunity and Judicial immunity as stated in defendant's motion to dismiss in the district court and defendant's statement re certificate of interest under Circuit Rule 5(b). Since they themselves claim to be a state agency, plaintiff submits that this is an admission for personal jurisdiction purposes. Thus, the contacts of the State of California by main taining offices in Illinois are continuing

and purposeful activity by the State of California within the State of Illinois and are also contacts of defendant for personal jurisdiction purposes. See Hutter Northern Trust v. Door County Chamber of Commerce, 403 F2d 481 (7CA 1968).

8. Prior to oral argument, it came to plaintiff's attention, despite that discovery had been denied to him, that defendant has other substantial and continuous contacts with Illinois and plaintiff attempted to bring this to the court's attemption by way of motion. See Appendix pages A-62 to A-71. In their opinion, the court of appeals states that plaintiff "alleged" that bar examiners attend a seminar held in Chicago every two years. This is no longer an allegation. Defendant has refused to respond to the motion and the failure to deny stands as an admission. Such attendance is now an established evidentiary fact.

While the bar examiners are in atten-

dance at the seminar in Chicago, if they are mugged or robbed, would they not have a right to assistance by the Chicago police and the Illinois courts? If there is a dispute over the hotel bill, would they not have recourse to the Illinois courts? Are these not benefits of conducting business in the forum?

9. The motion in the court of appeals reproduced in the Appendix at pages A62-71, also states and it is r[illegible] an established evidentiary fact by virtue of defendant's failure to deny, that defendant has continuous and substantial purposeful activity with the National Conference of Bar Examiners headquartered in Chicago, Illinois. The court phrases this activity as "obtains information" which is an incorrect trivialization of the activity. Defendant engages and retains, on a continual basis, for monetary consideration, the National Conference of Bar Examiners (NCBE) to investigate the character and fitness of out-of-state

applicants and to report the results of the investigation to defendant. This is a purposeful business activity engaged in by defendants within the state on a continuing basis as such hiring of services of NCBE within the state of Illinois is an ongoing activity for each sucessive bar examination given. NCBE is a hired investigator not only for Illinois applicants, but of all out-of-state applicants for each examination. The numbers of such applicants and the fee paid for investigation is not known by plaintiff having been denied discovery in both the district court and the court of appeals, however, the numbers of applicants and fees paid to NCBE can be presumed to be substantial over the long period of years.

Additionally, if there arises a dispute connected with the business relationship with NCBE, would defendant not be able to avail themselves of the Illinois courts to enforce their rights? Is this not a benefit of conducting business in the forum?

10. Defendant has attempted to submit a bill of costs to the Clerk of the Seventh Circuit Court of Appeals. In so doing, defendant has attempted to derive a direct benefit of the courts and laws of Illinois and attempted to use the court as a sword and not as a shield. In the Illinois State courts such activity would be itself be sufficient to defeat any special appearance made and to assert personal jurisdiction over defendants.

As to all of the above contacts, it is permissible to exercise personal jurisdiction even if the cause of action arose from activities entirely distinct from such conduct within the state. See Perkins v. Benquet Consolidated MIning Co., 342 US 437, Fissons Limited v. U.S., 458 F2d 1241, (7CA 1972) and Braband v. Beech Aircraft Corp. 51 Ill App.3d 296, 367 NE2d 118 (1972), aff'd 72 Ill 2d 548.

The court further states that "An essential criterion for establishing the

reasonableness of subjecting a nonresident defendant to litigation is "that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." and then further states that the contacts shown do not demonstrate any purposeful activity/which defendants have availed themselves of the benefits of conducting business in the forum. through

Plaintiff has shown hereinabove numerous instances wherein defendant has conducted purposefull activity in the forum. Is not accepting over a period of years thousands of applications from the forum state a purposeful activity in the forum? Is not the requiring of certification of applicants from within the forum state a purposeful activity in the forum? Is not accepting $47,700.00 from within the forum state for just one examination a purposeful activity within the forum? Is not the carrying out

of continuous mail correspondance with applicants within the forum a purposeful activity in the forum? Is not the giving of a portion of the California bar examination in the state a purposeful activity in the forum? Is not the soliciting for subsequent examination attendance and soliciting $18,400.00 for just one exam from applicants in the forum state, much less many other exams over the years, a purposeful activity in the forum? Is not the travel of bar examiners into the state to attend seminars a purposeful activity in the forum? Is not soliciting travel to California purposeful activity in the forum? Is not the application to the courts of the state to enforce from plaintiff defendant's costs a purposeful activity in the forum? The only thing that seems to be missing is for defendant to be headquartered in Illinois and this is surely not necessary for personal jurisdiction.

The order then goes on to rely heavily

upon the withdrawn opinion in Burstein v. State Bar of California, 659 F2d 670 (5CA 1982). Since the opinion was withdrawn, How can the court be sure that the withdrawn opinion represents the current thinking of the Burstein panel? Moreover,many of the contacts of defendant with Illinois were different in kind from the contacts with Louisiana and those that are the same are present here to a much greater degree. Additionally, the Burstein panel shown considerable interest in nationwide jurisdiction for federal questions. This issue was presented to the court but ignored.

The court then continues to talk about "unilateral activity". There is no per se constitutional requirement that the activity not be "unilateral". Assuming arguendo that unilateral activity does not quality for minimum contacts, plaintiff has demonstrated numerous non-unilateral activities of defendant in the forum state. For example,

soliciting subsequent examination applications from those who have failed is certainly not unilateral activity. Nor is soliciting $18,000.00 from applicants for just one exam much less many other exams, or soliciting travel from Illinois to attend State Bar functions from 413 members, or the State of California maintaining offices in Illinois, or travel of California State Bar examiners into the State of Illinois to attend seminars, or the contracting with NCBE in Chicago, Illinois to investigate, for a fee, thousands of applicants each year to accomplish one of defendant's business purposes.

The court then goes on to state that the activities are with "persons who happen to be Illinois residents". How else could it be? All contacts with any forum must be with persons or organizations which by circumstance just happen to be in the forum. This does not make it any less a minimum contact. The court would negate all activity of any organization or person with any forum

state and just leave the absurdity of activities with inanimate real estate in the forum state to establish minimum contacts.

The court refers to the transactions shown hereinabove as "sporadic and fortuitous". How can they be sporadic? They are repetative and continuous. If these activities are fortuitous, then all activity qualifying for long-arm jurisdiction minimum contacts are also fortuitious as it just happens that persons or organizations located within the particular state for which minimum contacts are sought, by chance, happen to be in the particular forum state and could have been elsewhere. Moreover, the convenient painting with a broad brush of labels such as unilateral activity, sporadic, and fortuitious are not constitutional considerations.

The cases relied upon by plaintiff, e.g. Great Western United Corp. v. Kidwell, 577 F2d 1256 (5CA 1978), Product Promotions, Inc. v. Cousteau, 495 F2d 483 (5CA 1974), and

Electro-craft Corp. v. Maxwell Electronics Corp., 417 F2d 365 (8CA 1969) are blithely distinguished based upon exertion of control in the forum state, producing substantial effects on business in the forum, or reasonable anticipation that business would have direct consequences in the form, none of which are constitutional considerations. What is business in the form? Can it be said that the alleged practices of defendant do not have substantial effects on business in the form? To those who take the exam, they do. The activities of defendant have direct consequences in the form as to those applicants who in good faith apply in anticipation of fair treatment and are not fairly treated. If defendant did not anticipate being haled into court in Illinois, they have been wearing blinders. Anyone who conducts affairs as alleged in the complaint knows or should have known with anticipation and foresight that they could be haled into a court

outside of their safe sanctuary within their own state.

The cases relied upon by plaintiff for finding personal jurisdiction with "unilateral activity" are as follows:

Products Promotions Inc. v. Cousteau, 495 F2d 483 (5CA 1874) shows a case where plaintiffs, a Texas company searched out and sought Cousteau in France. Cousteau neither individually or by agent maintained a regular business or a designated agent for service of process in Texas. There were letters sent between parties and one of plaintiff traveled to France. The court held on page 496 that even if defendant performs no physical act within the state, activities outside the state can provide adequate contacts if they have reasonably forseable consequences within the state. The court further stated that:

> "On the other hand, the Supreme Court in McGee demonstrated that a single contract by mail can be constitutionally sufficient, reducing the minimum

contacts requirements, in the words of one scholar, 'to a gossamer touch'."

In Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F2d 365 (8CA 1969) plaintiff wrote to defendant and stated that it would be interested in representing defendant. Defendant responded. Negotiations were conducted by mail and by telephone. A representative of plaintiff travelled to Texas to view defendant's manufacturing facilities. As a result of the negotiations, plaintiff mailed from Minnesota to Texas an order and defendant mailed back an acceptance. Defendant never had an officer, employee or agent in Minnesota, and never maintained an office or any physical facility in Minnesota, never advertised directly in Minnesota, and never qualified to do business in Minnesota. This transaction was the only one between the parties. As the court states at page 369:

> "It (defendant) entered into a transaction having an impact on the commerce of that state. By doing so, it invoked the benefit and protection of Minnesota's law and could reasonably

have anticipated that its acts would have consequences in Minnesota. The fact that no agents of defendant entered the state is not controlling. . .

Wile the plaintiffs initiated negotiations with the defendant, the defendant actively and voluntarily participated in them thereafter... The cause of action clearly arose out of defendant's contacts with the Minnesota resident".

Personal jurisdiction can also be found based upon Great Western United Corp. v.Kidwell 577 F2d 1256 (5CA 1978) wherein the director of the Department of Finance of the State of Ohio was enforcing the Idaho statutes and had no connection with Texas, however, as the court stated at pages 1266,1267:

"Minimum contacts, however, need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects on the forum state will suffice...Very little purposeful activity is necessary to satisfy the minimum contacts requirements..." The impact of their acts was felt in the forum state, as it was intended to be."

DISCOVERY

Plaintiff has the burden of establishing personal jurisdiction and the effect of

dismissing the complaint for lack of sufficiency in the district court and staying discovery on jurisdictional issues meant that plaintiff would not be able to take discovery regarding personal jurisdiction matters to ascertain information which may be crucial to the determination of personal jurisdiction over the defendants prior to the district court's decision. Thus, plaintiff has the burden and was denied the means upon which he must rely in order to carry forward the burden since all of the information requested is secretively held by defendants.

Personal jurisdiction issues were decided by the district court and the court of appeals against plaintiff without permitting plaintiff to take discovery on such issues to reinforce his case since the information is not otherwise obtainable. The courts decided beforehand that no discovery information could be uncovered to gain personal jurisdiction and therefore discovery was not

permitted. Thus, a finding against plaintiff on personal jurisdiction without permitting discovery becomes a foregone conclusion. Such is contrary to our notions of fair play and substantial justice and violates due process.

The submission of interrogatories to ascertain information pertinent to a determination of personal jurisdiction is well established. River Plate Corp. v. Forestall L.T. & R. Co., 185 F.Supp. 832 (DC NY 1960), Commonwealth Oil Refining Co. v. Houndry Process Corp., 22 FRD 306 (DC Puerto Rico 1958), Tradesmen National Bank & Trust Co. v. Charlton Steam Shipping Co., 3 FRD 363 (DC Pal944), and Jiffy Lubricator Co., v. Alemite Co., 28 F.Supp. 385 (DC ND 1939). Moreover, dismissal without plaintiff being given ample opportunity to prove jurisdiction by discovery is not proper. Process Control Corp. v. Witherup Fabrication and Erection Inc., 439 F.Supp. 1284 (DC Ga 1977), Aamco Automatic Transmissions Inc. v. Tayloe 368 F.Supp. 1283 (DC Pa 1973).

Plaintiff has been unable to uncover any cases where it was held proper to deny to the party having the burden of establishing personal jurisdiction the right to take discovery to establish such personal jurisdiction.

These orders were included in the notice of appeal and were affirmed by the court of appeals.

THE SUFFICIENCY OF THE COMPLAINT

The amended complaint was dismissed under all of the 23 grounds urged by defendant under Rules 8,9,10 and 12 F.R.C.P. by the order of the district court of May 13, 1981. Appendix page A36. In response, a second amended complaint was filed. The final order of the district court of June 29, 1981 (page A-20) casts grave dispersons on the sufficiency of the second amended complaint and the court of appeals refused to consider this matter and inferred approval even though the order was appealed from in the notice of appeal. Such is totally contrary to the spirit of

Conley v. Gibson, 355 U.S. 41 (1957).

SUFFICIENCY OF THE AMENDED COMPLAINT UNDER RULE 23 F.R.C.P.

The amended complaint was also dismised in the order of the district court of May 13, 1981 (page A36) for failure to comply with Rule 23 F.R.C.P.

There is no requirement in Rule 23 that the complaint as originally filed must comply with the rule. Rule 23(c) specifically provides for motions and a determination as soon as practicable after the commencement of an action brought as a class action as to whether it can be maintained as a class action. There is no provision for dismissal of a complaint under Rule 23 and plaintiff has been unable to uncover any cases regarding such a dismissal. There are even times when a case not brought as a class action is permitted to be a class action at a later time. The action of the district court dismissing the amended complaint for lack of compliance with rule 23 is unprecedented. This was impliedly

affirmed by the court of appeals.

SUBJECT MATTER JURISDICTION

Defendant moved in the district court for dismissal for lack of subject matter jurisdiction claiming Eleventh Amendment immunity and judicial immunity. This issue was appealed and even though both parties requested a ruling on this issue, the court of appeals refused to rule on it.

Defendant strongly relies upon the fact that traditionally, the states have a compelling interest in the professions within their boundaries which gives them broad power to establish standards for licensing practitioners in regulating the practice of the professions. See Goldfarb v. Virginia State Bar, 421 US 773 (1975), and Reynolds v. Sims, 377 US 533 (1964) where the court quoting from Gomillion v. Lightfoot, 364 US 339, (1960) states:

> "It is also contended that principles of comity and federalism counsel judicial restraint in these cases.

> Regulation of the legal profession, to be sure, is largely the province of the states and the District of Columbia, but the federal courts nevertheless have a responsibility to listen when a litigant charges constitutional or federal statutory violations. As the Supreme Court has observed, '(W)hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

Put another way, a state cannot, under the guise of regulating the legal profession, ignore constitutional rights. N.A.A.C.P. v. Button, 371 U.S. 415 (1963). It is beyond question that bar examiners are subject to the requirements of the Due Process and Equal Protection Clauses of the U.S. Constitution in the conduct of their duties. See Schware v. Board of Examiners, 353 U.S. 232 (1957).

As the three-judge court said in Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F.Supp. 1392 (D.Hawaii 1971) at page 1395:

> "Defendants urge that this court is without jurisdiction to hear the case. Defendants' position is that

under Theard v. United States, 354 US 278... a federal district court may not sit in judgment on any state court orders relating to admission, discipline and disbarment of members of its bar, and that such orders may be reviewed only by the Supreme Court of the United States on certiorari to the state court. The same argument was presented to other three-judge courts, viz., Keenan v. Bd. of Law Examiners, 317 F.Supp. 1350 (E.D.N.C. 1970); Webster v. Wofford, 321 F.Supp. 1259 (N.D.Ga. 1970); Law Students Civil Rights Council, Inc., v. Wadmond, 299 F. Supp. 117 (S.D.NY 1969), aff'd 401 US 154...and Lipman v. Van Zant, 329 F.Supp. 391 (D.C.N.Miss. 1971). Each of these courts held that while Theard controls when questions of bar disciplinary proceedings not involving constitutional questions are concerned, it does not foreclose a three-judge district court from taking jurisdiction over a challange on constitutional grounds to state bar admissions requirements, whether prescribed by state statute, or by administrative or court rule. We agree."

Further as stated by Judge Friendly for the three-judge court in Law Students Civil Rights Research Council, Inc., v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969) at 123,124:

"(when the) plaintiffs do not challange a state court's disposition of an individual case, but attack (on constitutional grounds)... the rules and regulations promulgated and administered by the (defendants), ...the alleged infringement of (the constitutional rights) of (the plaintiffs) cannot be dissipated by the processing of particular

> individuals' applications for admission to the bar...(This) make(s) appropriate our consideration of equitable relief even though the defendants would be immune from liability in damages for their administration of the challanged proceedures (citing cases). To hold otherwise would be to leave without a remedy a significant class of deprivations of federal rights under color of state law that Congress intended to redress under 42 USC 1983 and 28 USC 1343."

Defendant has claimed judicial immunity. It is undisputed that even a court, much less a state bar is not immune from civil rights statutes and that the federal courts have subject matter jurisdiction in such cases. See Supreme Court of Virginia v. Consumers Union, 100 S.Ct. 1967 (1980) and the companion case Consumers Union v. Virginia State Bar, 100 S.Ct. 2980 , and the consolidated cases of Feldman v. Garner, and Hickey v. District of Columbia Court of Appeals, 661 F2d 1295 (D. Columbia 1981)(subsequently granted certiorari). Moreover, the federal courts have jurisdiction over bar examiners with regard to anti-trust violation,especially

when the practice of grading is chablanged, as it is in the present case. See Ronwin v. State Bar of Arizona, 663 F2d 914 (9CA 1981).

Defendant also claims Eleventh Amendment immunity to damages, contrary to the congressional intent under 42 USC 1985, that damages cannot be ascribed to them because they are an agency of the State of California. However, defendant has not shown that they receive any monies, or the extent of such monies compared with other sources of income. See Ronwin v. State Bar of Arizona, supra.

FORUM NON-CONVIENCE AND VENUE

Defendant has brought up the subject of transfer of venue under 28 USC 1404(a) for the first time on appeal. It should be noted that under Rule 12 FRCP defendant has waived venue, but has sought a transfer under forum non-convenience in that proportedly all their records are in California as are their witnesses. However, this matter should be able to be easily disposed of by summary

judgement based on answers to interrogatories propounded to defendant which defendant has thus far refused to answer.

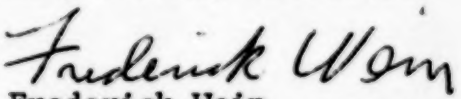
It is imperative that this court find forum non-convenience in favor of plaintiff. Considering the hostility plaintiff has encountered in the lower courts, it is almost a certainty that despite any finding in favor of personal jurisdiction for plaintiff, that the action would almost certainly be transferred thereby making any success by plaintiff a hollow victory.

The named plaintiff is currently a resident of Cook County Illinois and filed suit there. He has a substantial contact with the situs of venue. Unless evidence and circumstances strongly favor transfer, which in this case it does not, plaintiff's choice of forum should not be disturbed. Plaintiff's choice of forum is entitled to paramount consideration and the party seeking transfer bears a heavy burden.

CONCLUSION

Accordingly, it is believed that the present case fully meets the considerations governing review under Rule 17 and qualifies for the granting of a writ of Certiorari. The granting of the writ is respectfully requested.

Respectfully submitted,



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